RECENT CASES

CONFLICT OF LAWS—COURTS—APPLICATION OF THE DOCTRINE OF *Swift v. Tyson* TO THE UNIFORM NEGOTIABLE INSTRUMENTS LAW—Plaintiff, a resident of Pennsylvania, sued defendant, a resident of Florida, on promissory notes executed, delivered, and payable in Florida, in a federal district court. The notes were held non-negotiable under the Negotiable Instruments Law of Florida.[1] An appeal was taken to the Supreme Court of the United States. *Held,* that the notes were negotiable,[2] the district court having erred in using the general principles of the law merchant as a basis for interpreting the Florida law rather than the pertinent decisions of the Supreme Court of Florida. *Burns Mortgage Co. v. Fried,* 54 Sup. Ct. 813 (1934).

Under our dual system of courts which frequently allows a federal court to exercise jurisdiction in local matters normally adjudicated in the state tribunals, a vexatious condition has arisen because federal courts often refuse to be bound by the decisions of the state in which the cause originated—and this while professing to apply the law of that state.[3] This has created the highly anomalous situation of conflicting decisions on identical points.[4] Accordingly, the result in a given case may depend merely upon the adventitious circumstances of diversity of citizenship or the amount of claim. The Federal Judiciary Act, designed to obviate this difficulty, made the "laws" of the states binding on the federal courts in deciding local matters.[5] The Supreme Court, however, in *Swift v. Tyson,*[6] early whittled this ambiguous term by interpreting it to exclude decisions based on the non-statutory commercial law, although it was said to include statutes and the decisions construing them. In later years the scope of this decision has been broadened by excluding likewise decisions in fields of law other than the commercial law,[7] thereby swelling the morass of conflicting decisions. In more recent times some courts have further extended the doctrine so as to exclude even statutes from the scope of the term "laws", where these statutes were merely codifications of previously existing law,[8] the analogy being drawn to cases involving the general common law. In the principal case, however, the Supreme Court, by its refusal to recognize any distinction in this

1. The decision was affirmed by the Circuit Court of Appeals in Burns Mortgage Co. v. Fried, 67 F. (2d) 352 (C. C. A. 3d, 1933).

2. The bills and notes point involved was whether a provision for installment payments of interest before maturity and one for added interest on deferred interest payments prevented negotiability. Although the point is not covered specifically by the Negotiable Instruments Law, most courts favor negotiability. See 1 DANIEL, NEGOTIABLE INSTRUMENTS (7th ed. 1933) 66, 67.

3. Chicago, Milwaukee & St. Paul R. R. v. Solan, 169 U. S. 133 (1898); Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co., 106 Fed. 116 (C. C. D. Mass. 1895).

4. For a comprehensive collection of such cases, see Note (1912) 40 L. R. A. (N. S.) 380.

5. 1 STAT. 92 (1789), 28 U. S. C. A. §725 (1927). "The laws of the several states . . . shall be regarded as rules of decision . . . in the courts of the United States." It has been shown that this was the purpose of the Act. See Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1924) 37 HARV. L. REV. 49, 83.

6. 16 Pet. 1 (U. S. 1842).

7. Carpenter v. Providence Washington Ins. Co., 16 Pet. 495 (U. S. 1842) (insurance contract); Baltimore & Ohio R. R. v. Baugh, 149 U. S. 368 (1892) (torts); Johnson v. Charles D. Norton Co., 159 Fed. 361 (C. C. A. 6th, 1908) (contract of guarantee).

8. Mutual Life Ins. Co. v. Lane, 151 Fed. 276 (C. C. E. D. Ga. 1907), *cert. denied,* 208 U. S. 617 (1908) (insurance statute); Capital City State Bank v. Swift, 290 Fed. 505 (D. C. Okla. 1923) (Negotiable Instruments Law of Okla.); American Mfg. Co. v. United States Shipping Bd. Emerg. Fleet Corp., 7 F. (2d) 565 (C. C. A. 2d, 1925) (Uniform Sales Act of N. Y.).

respect among the various types of statutes, has definitely set itself against any expansion of the doctrine which will trench upon the field of statutory law.[9] The result seems eminently proper. Besides the fact that statutory law was expressly exempted from the doctrine announced in *Swift v. Tyson,* there is no sound reason for its extension in the face of the well merited criticism which it has drawn,[10] and which has been directed primarily at the resultant lack of uniformity in the law.[11]

CONFLICT OF LAWS—SURVIVAL OF ACTIONS—ENFORCEMENT OF RIGHT OF ACTION UNDER FOREIGN STATUTE AGAINST EXECUTOR OF TORTFEASOR—Plaintiff sustained injuries in an automobile accident in Virginia through the negligence of defendant's testator, both being residents of New York. Plaintiff brought suit in New York under a Virginia statute providing for survival of such actions against tortfeasors' estates.[1] New York does not permit such actions.[2] *Held,* that since the law of the forum determines the devolution of decedents' estates, the court was here without jurisdiction to grant judgments binding on domiciliary executors. *Herzog v. Stern,* 264 N. Y. 379, 191 N. E. 23 (1934).

Whether a cause of action for damages survives the death of the wrongdoer is determined by the law of the place of wrong.[3] Conceding this, the instant court refused to enforce such claim against the tortfeasor's estate, restricting application of the rule to cases in which the law of the forum permits such survival action.[4] This restriction seems to be unwarranted in theory. By adopting a rule similar to that of the foreign rule the court is not, out of comity, giving extraterritorial effect to the foreign law, but is rather enforcing its own conflict of laws rule.[5] It would be merely an application of its own common law rule of conflict of laws that a statutory or common law right acquired in the place of wrong will be enforced in the forum unless it is repugnant to the latter's public policy, even though the *lex fori* grants no such right.[6] The court would be imposing this liability

9. Principal case at 815.

10. See Dobie, *Seven Implications of Swift v. Tyson* (1930) 16 VA. L. REV. 225; Fordham, *The Federal Courts and the Construction of Uniform State Laws* (1928) 7 N. C. L. REV. 423.

11. A striking example of the effect of this lack of uniformity is seen in Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U. S. 518 (1927). A contract for an exclusive taxicab stand was declared illegal by the state court. One of the parties then incorporated itself in an adjoining state, thereby obtaining federal jurisdiction. The federal court then held the contract legal, in effect reversing the state court on a purely local question.

1. VA. CODE (1930) § 5790.

2. DECEDENT ESTATE LAW § 120 (1909).

3. RESTATEMENT, CONFLICT OF LAWS (Tent. Draft, 1932) § 426; *cf.* Orr v. Ahern, 107 Conn. 174, 139 Atl. 691 (1928); Friedman v. Greenberg, 110 N. J. L. 462, 166 Atl. 119 (1933). In both cases recovery was denied because the place of wrong had no survival statute although one did exist in the forum.

4. Accord: RESTATEMENT, CONFLICT OF LAWS (Tent. Draft, 1932) § 426, Comment (b). Only one case is cited and no arguments are suggested.

5. "The conflict of laws is a part of the common law, and the conflict of laws rules of each state are part of its law. They determine when and to what extent the foreign law element enters into cases brought before them. . . ." GOODRICH, CONFLICT OF LAWS (1927) 8; Dicey, *Private International Law as a Branch of the Law of England* (1890) 6 L. Q. REV. 1.

6. Loucks v. Standard Oil Co. of N. Y., 224 N. Y. 99, 120 N. E. 198 (1918); RESTATEMENT, CONFLICT OF LAWS (Proposed Final Draft No. 4, 1934) § 419; GOODRICH, CONFLICT OF LAWS (1927) 189; *cf.* Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE L. J. 457.

on the estate not by force of any foreign law but rather because it has determined that *its* conflict of laws rule requires that such liability be imposed. There seems to be no necessity that there be also a local statute imposing such liability in order that the state's sovereignty be preserved. It must be conceded, however, that the court has the power to refuse to enforce such a claim because it may deem it undesirable to do so. Whether exercise of this power was here justified practically is likewise doubtful. It seems desirable that a right once acquired in one state should be uniformly enforced [7] and only exceptional circumstances should lead one state to refuse to enforce such right.[8] The circumstances of the instant case do not warrant such refusal. A judgment against the estate would not be inequitable to anyone concerned. Had the tortfeasor been alive, the plaintiff would have recovered. The fortuitous circumstance of the death of the tortfeasor, under the decision in the instant case, is then a windfall to legatees and distributees and deprives the plaintiff of just compensation.[9] Moreover, the meager authority extant is opposed to the result here reached, the courts apparently being unpersuaded that there was sufficient ground to deviate from their established rules of conflict of laws.[10]

CONTRACTS—ARBITRATION AND AWARD—VALIDITY OF ARBITRATION SETTLING DISPUTES OVER ILLEGAL TRANSACTIONS—Plaintiff and defendant, members of the same Grain and Cotton Exchange, entered into a written agreement,[1] whereby a controversy which had arisen between them over some marginal speculations in wheat should be submitted to an arbitration board for decision. The disputed transactions were clearly illegal,[2] being prohibited by a gaming statute.[3] Plaintiff sued on an award in his favor. *Held,* that the "incidental" connection of the obligations arising under the arbitration award with the illegal transaction did not invalidate plaintiff's case. *Smith v. Gladney,* 70 S. W. (2d) 342 (Tex. 1934).

With almost equal firmness two legal principles have become established in their respective paths: (1) a contract incidentally connected with or growing out of an illegal transaction is not thereby necessarily unenforceable;[4] and (2) disputes concerning an illegal matter or transaction are not proper subjects for arbitration, the award in such case standing upon no higher ground than the original claim and being consequently unenforceable.[5] Rarely have they con-

7. Beach, *Uniform Interstate Enforcement of Vested Rights* (1917) 27 YALE L. J. 656.

8. See Loucks v. Standard Oil Co. of N. Y., 224 N. Y. 99, 113, 120 N. E. 198, 202 (1918).

9. Evans, *Survival of Claims For and Against Executors and Administrators* (1930) 19 KY. L. J. 195.

10. Chubbuck v. Holloway, 182 Minn. 225, 234 N. W. 314 (1931), *rev'd* on other grounds, 182 Minn. 231, 234 N. W. 868 (1931); for favorable comment, see (1931) 29 MICH. L. REV. 929; *cf.* (1931) 15 MINN. L. REV. 705; Kertson v. Johnson, 185 Minn. 591, 242 N. W. 329 (1932).

1. The consideration stated in the "Contract and Agreement for Arbitration" was ". . . avoiding litigation and . . . saving time and expense" and the mutual signing of ". . . this agreement or a duplicate of this agreement." Instant case at 344.

2. The court in overruling plaintiff's faint contention to the contrary as to the interpretation of The Grain Futures Act, 42 STAT. 998 (1922), 7 U. S. C. A. § 6 (1927), quoted Dickson v. Uhlmann Grain Co., 288 U. S. 188, 198 (1933).

3. TEX. PEN. CODE (1925) §§ 658, 661.

4. Armstrong v. Toler, 11 Wheat. 258 (U. S. 1826); Nye v. Chase Nat. Bank, 34 F. (2d) 435 (C. C. A. 8th, 1929); De Leon v. Trevino, 49 Tex. 88 (1878); 3 WILLISTON, CONTRACTS (1922) § 1752.

5. Singleton v. Benton, 114 Ga. 548, 40 S. E. 811, 58 L. R. A. 181 (1902); Hall v. Kimmer, 61 Mich. 269, 28 N. W. 96 (1886); Fain v. Headerick, 44 Tenn. 327 (1867); Aubert v. Maze, 2 Bos. & P. 371 (C. P. 1801).

verged into conflict. But when they have, the latter, more fundamental, has generally been supported.[6] The instant case nevertheless reached the opposite result in summary fashion. Much emphasis was placed by the court on the recognized test of the enforceability of a demand connected with an illegal transaction:[7] whether plaintiff can establish his case without the aid of the illegal matter.[8] "Freedom of contract" disciples and traders in commodity futures[9] might hail this. However, the label "incidental to the illegal speculation" placed by the court on the arbitration contract cannot explain away the fact that the result is bad in both legal theory and practice. In the instant case, suit was on the arbitration award. Therefore, what is a fit subject for arbitration must be considered before the validity of any award growing out of the proceedings can actually be determined. Yet the court hardly considered the obvious fact that the arbitration contract was formed expressly to settle differences arising directly from illegal dealings.[10] If, in similar situations, the "incidental connection" rule should continue to be supported by courts, it would seem practically that a prospect of the settlement of disputes over illegal matters by courts of law might readily be foreseen. Therefore, steady refusal to allow unlawful matters to be fit subjects for arbitration seems preferable to the otherwise likely paradox of having courts of law actively participate in the settling of illegal transactions. Hence, the desired solution is adherence to basic common-law principles concerning fit subjects for arbitration first,[11] the "incidental taint of illegality"[12] rule in contracts afterwards.

CONSTITUTIONAL LAW—CONSTITUTIONALITY OF AGRICULTURAL ADJUSTMENT ACT AS A REGULATION OF INTERSTATE COMMERCE—FIXING OF MILK PRICES FOR CHICAGO SALES AREA—Defendants were engaged in purchasing milk from producers in Wisconsin and Illinois, then selling and distributing the

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6. Singleton v. Benton, 114 Ga. 548, 40 S. E. 811, 58 L. R. A. 181 (1902); *cf.* Tandy v. Elmore-Cooper Live Stock, 113 Mo. App. 409, 87 S. W. 614 (1905) (note for the amount of an arbitration award arising out of an illegal transaction held to be tainted by the original illegality); Polk v. Cleveland Ry., 20 Ohio App. 317, 151 N. E. 808 (1925). *Contra:* Davis v. Wentworth, 17 N. H. 567 (1845), for an adverse criticism of which see Note (1903) 58 L. R. A. 182; *cf.* Goodwin v. Yarbrough, 1 Stew. 152 (Ala. 1827); Noble v. Peebles, 13 S. & R. 319 (Pa. 1825).

7. Thomas v. Little, 209 Ala. 590, 96 So. 896 (1923); Taylor v. Chester, L. R. 4 Q. B. 309 (1869); RESTATEMENT, CONTRACTS (1932) § 597; see Tomkins v. Seattle Construction & Dry Dock Co., 96 Wash. 511, 513, 165 Pac. 384, 385 (1917).

8. Plaintiff in the principal case could do this easily, since *prima facie* a valid written contract existed to abide by the arbitration award. *Supra* note 1.

9. Taylor, *Trading In Commodity Futures—A New Standard Of Legality* (1933) 43 YALE L. J. 63, at 92. "The erratic and hostile attitude of the courts toward the exchanges has simply tended to lower the moral sense of the community by encouraging 'welching'. It is all very well for the courts to refuse to enforce frank 'bets', but to decline legal sanction to an enormous section of business practice, much of which is carried on with serious and justifiable motives, is to undermine respect for business obligations and endanger commercial honesty."

10. And yet it is settled that illegal transactions are not a fit subject for arbitration. Pittsburgh Const. Co. v. West Side Belt R. R., 151 Fed. 125 (W. D. Pa. 1907); Smith, Coney & Barrett v. Becker, Gray & Co. (1916) 2 Ch. 86; 6 LAWSON, RIGHTS, REMEDIES AND PRACTICES (1890) § 3306.

11. *Supra* note 10.

12. Mr. Justice Holmes, in Graves v. Johnson, 179 Mass. 53, at 58, 60 N. E. 383 (1901), observed, in fixing the degree of proximity to the illegal transaction necessary to taint a new contract, that the moral turpitude involved in the original transaction will be given some weight by the court. "The line of proximity will vary somewhat according to the gravity of the evil apprehended." RESTATEMENT, CONTRACTS (1932) § 597, Comments a and b, recognize this.

same to consumers in the Chicago Sales Area.[1] Defendants violated the provision of the Chicago Milk License, issued by the Secretary of Agriculture under authority vested in him by the Agricultural Adjustment Act,[2] which fixed the minimum prices [3] to be paid by distributor to producer.[4] The Secretary sought to enjoin defendants from continuing in business, after their licenses were revoked. *Held,* that a temporary injunction be granted, the Agricultural Adjustment Act being constitutional and the licenses issued pursuant thereto valid as a regulation of interstate commerce. *United States v. Shissler,* 7 F. Supp. 123 (N. D. Ill. April 1934). *Contra: Edgewater Dairy Co. v. Wallace,* 7 F. Supp. 121 (N. D. Ill. June 1934).[5]

The decisions dealing with the interpretation of Congress' power to regulate interstate and foreign commerce show considerable diversities,[6] and, on the whole, do not lead to any definite conclusions as to the scope of this power. There are many and seemingly contradictory cases both for and against a decision favoring the powers purported to be granted under the Agricultural Adjustment Act.[7] They may, however, be divided generally into two groups enunciating for different purposes contrary theories of interpretation. The stricter view is that there is a definite and real distinction between production or manufacture and commerce.[8] The court in the *Edgewater* case adopted this view, and declined to support the price-fixing measures solely on the ground that they were an attempt to regulate the "production" of milk through the milk distributors.[9] Other cases uphold a broad, inclusive authority of Congress under the commerce

1. Under the License, this comprises the city of Chicago and all that territory within thirty-five miles of the corporate limits of the city of Chicago. License for Milk-Chicago Milk Shed. U. S. L. WEEK, A. A. A. Agreements and Licenses, at 4-001.

2. 48 STAT. 31, 7 U. S. C. A. §§ 601-609 (Supp. 1933). Section 8 (3) of the Act gives to the Secretary of Agriculture authority to issue licenses "permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof."

3. License for Milk-Chicago Milk Shed, Exhibit A, U. S. L. WEEK, A. A. A. Agreements and Licenses, at 4-003.

4. Section III of the License provides: "Now, therefore, the Secretary of Agriculture . . . hereby licenses each and every distributor of fluid milk for consumption in the Chicago metropolitan area to engage in the handling in the current of interstate or foreign commerce of said fluid milk," *etc.* U. S. L. Week, A. A. A. Agreements and Licenses, at 4-002.

5. In treating the two cases as *contra,* there is this *caveat* to be considered. The facts of the Edgewater Dairy Co. case do not in express terms indicate that the parties plaintiff are distributors of milk. The text of the opinion, however, strongly impresses one that this is the fact, and it is submitted that this is the only reasonable inference, especially in view of the fact that it is the distributors who are licensed under the License for Milk.

6. For example, one who mines company coal to be used in hauling interstate freight is not engaged (or employed) in interstate commerce, Delaware, L. & W. R. R. v. Yukonis, 238 U. S. 439 (1915); but an employee of an interstate railroad company who cooks food which is fed to workmen who are employed in repairing a bridge on an interstate railroad is engaged (or employed) in interstate commerce, Philadelphia, B. & W. R. R. v. Smith, 250 U. S. 101 (1910). The solicitation of insurance is not interstate commerce, Paul v. Virginia, 8 Wall. 168 (U. S. 1869); but the solicitation of advertising is, Ramsay Co. v. Associated Bill Posters, 260 U. S. 501 (1923); as is also the solicitation of freight and passenger business. McCall v. People, 136 U. S. 104 (1890).

7. ". . . Anybody may cite cases seeming to prove the particular contention of the orator, with reference to congressional powers over state activity. It is evident that a mere citation of precedents will lead to no conclusion, other than that the cases indicate more and more about less and less." Feuerlicht, *The Interstate Commerce Clause and the N. R. A.* (1934) 9 IND. L. J. 434, 439.

8. Kidd v. Pearson, 128 U. S. 1 (1888); Susquehanna Coal Co. v. South Amboy, 228 U. S. 665 (1913); Hammer v. Dagenhart, 247 U. S. 251 (1918).

9. See 7 F. Supp. 121 (N. D. Ill. 1934) 122-123.

clause.[10] The *Shissler* case adopted this more liberal attitude. An explanation of the anomaly of the same court adopting, within a period of less than three months, each of these contradictory views is not discernible from the decisions, the later failing to mention the earlier. Nor did any insurmountable legal obstacle compel the conclusion reached in the *Edgewater* case. The Supreme Court has never so defined "regulation of interstate commerce" as to *exclude* the factual set-up of this case from its definition. The interpretations of this clause have been stated in vague and general terms,[11] so that the bases of the decisions have been almost wholly factual. The court, in the *Edgewater* case, might easily have fitted the facts of that case into these prior definitions. The decision in the *Shissler* case seems preferable. Business today is transacted on a national scale, and the development of the facilities for transportation and communication has increased the volume of interstate activity. The price, then, at which an article sells in one state will directly affect the price of the same article in neighboring states, and thereby affect the interstate commerce in that article. Furthermore, an economic depression causes local conditions to affect more directly interstate commerce than under normal circumstances, since industry in one area becomes far more sensitive to standards elsewhere.[12] There seems, then, to be not only legal justification for the *Shissler* decision, but social and economic sanction as well.

CONSTITUTIONAL LAW—CONTROL OVER CURRENCY—POWER OF CONGRESS TO NULLIFY GOLD CLAUSES—Plaintiffs sought judgment on bonds obligating defendants to pay in gold coin of the standard of weight and fineness existing when the debt was incurred. Joint Resolution of Congress, June 5, 1933, declared such clauses void and all obligations containing them dischargeable in any current legal tender, dollar for dollar.[1] *Held,* that the Resolution was constitutional as an exercise of Congress' power over currency. *In the Matter of the Missouri Pacific Railroad,* U. S. L. WEEK, June 26, 1934, at 945 (E. D. Mo. 1934); *Norman v. Baltimore and Ohio Railroad,* 265 N. Y. 37, 191 N. E. 726 (1934).[2]

The thesis of the courts' argument may be stated in two propositions: (1) The Constitution reposes in Congress the power to determine the nature and composition of the circulating medium; (2) Since this Joint Resolution is merely an effort to effect a change in the circulating medium, it is authorized by the Constitution. In cases related to the first proposition it has been held that Congress has power to eliminate state bank notes from circulation in order to exclude the use of all currencies but its own,[3] to declare something besides gold and silver legal tender,[4] and to exercise the money power and the power of eminent domain to prohibit gold hoarding.[5] When considered in the aggregate,

10. Gibbons v. Ogden, 9 Wheat. 1 (U. S. 1824); Hippolite Egg Co. v. United States, 220 U. S. 45 (1911); Richmond Hosiery Mills v. Camp, 7 F. Supp. (N. D. Ga. 1934).

11. The courts speak in terms of such formulae as "fostering and protecting interstate commerce", "in the current of interstate commerce", "burdens on interstate commerce", "effect on interstate commerce", and "public interest".

12. See Note (1933) 47 HARV. L. REV. 85, 89.

1. 48 STAT. 112, 31 U. S. C. A. § 463 (1933).

2. Cert. granted, U. S. L. WEEK, Oct. 9, 1934, at 10, #270.

3. Veazie Bank v. Fenno, 8 Wall. 533 (U. S. 1869).

4. Legal Tender Cases, 12 Wall. 457 (U. S. 1870) [overruling Hepburn v. Griswold, 8 Wall. 603 (U. S. 1869)]; Juillard v. Greenman, 110 U. S. 421 (1884).

5. Campbell v. Chase National Bank of City of New York, 5 F. Supp. 156 (S. D. N. Y. 1933); *cf.* Ling Su Fan v. United States, 218 U. S. 302 (1910) (holding that the power to coin money involves the power to prohibit its export). See Thayer, *Legal Tender* (1887) 1 HARV. L. REV. 73, 83-85.

these precedents in the federal courts favor such a broad interpretation of the money and borrowing powers that the first proposition may be accepted as a correct statement of the law. In order to test the second proposition, it is necessary to apply the *McCulloch v. Maryland* doctrine that the means used must be plainly calculated to attain the authorized end.[6] As the enactment of the Resolution may be considered an effort of the government to insure the use of its currency[7] as the basic unit of exchange, this time-honored requirement is properly satisfied.[8] It is then unimportant whether the parties bargained for gold as a commodity or merely stated a money obligation,[9] since the number of gold clause obligations is so great that their literal enforcement would involve the use of gold as a standard of exchange and hence bring them within the currency power.[10] The fact that there was no substantial variation from the amount of purchasing power intended to be secured, but rather a re-adjustment of the literal terms of the obligations to economic conditions, serves to quiet the misgivings which might otherwise have attended the present result.[11]

CONSTITUTIONAL LAW—TAXATION—CONSTITUTIONALITY OF STATUTE IMPOSING TAX ON NET PROCEEDS OF FOREIGN FIRE INSURANCE COMPANIES WITHOUT DISCRIMINATION AS TO SOURCE OF PROCEEDS—State of Illinois sued appellant fire insurance company, incorporated in Wisconsin and licensed to do business in Illinois, for tax on net receipts from casualty insurance. The taxing statute[1] governed fire, marine, and inland navigation insurance companies and

6. 4 Wheat. 316 (U. S. 1819).

7. On May 12, 1933, Congress empowered the President to issue three billion dollars in United States notes and to decrease the gold content of the dollar. The notes were to be legal tender for the payment of all debts. 48 STAT. 51, 31 U. S. C. A. § 821 (1933).

8. Veazie Bank v. Fenno, 8 Wall. 533 (U. S. 1869).

9. The recent House of Lords decision, *In re* Société Intercommunale Belge d'Electricité, Feist v. Société, [1934] A. C. 161, interpreted a gold clause as stating the true value of the obligation. See (1934) 82 U. OF PA. L. REV. 533. Decisions in the American state jurisdictions treating the contract on the commodity theory and enforcing the gold clause are: Myer and Wormer v. Kohn and Dauterman, 29 Cal. 278 (1865); Myers and Marcus v. Kaufman, 37 Ga. 600 (1868); Dutton v. Pailaret, 52 Pa. 109 (1866). Earlier Supreme Court decisions upholding the gold clause employed both the commodity and "dual currency" theories. Bronson v. Rodes, 7 Wall. 229 (U. S. 1868); Butler v. Horwitz, 7 Wall. 258 (U. S. 1868); Gregory v. Morris, 96 U. S. 619 (1877). Gradually the commodity theory received less emphasis. Dewing v. Sears, 11 Wall. 379 (U. S. 1870); Trebilcock v. Wilson, 12 Wall. 687 (U. S. 1871) (where the clause ran "payable in specie"); Thompson v. Butler, 95 U. S. 694 (1877). Among the state cases refusing to enforce the gold clause were: Dewing v. Sears, 14 Allen 413 (Mass. 1867); Rodes v. Bronson, 34 N. Y. 649 (1866); Irving Trust Co. v. Hazlewood, 148 Misc. 456, 265 N. Y. Supp. 57 (1933); Shollenburger v. Brinton, 52 Pa. 9 (1866). See generally Nebolsine, *The Gold Clause in Private Contracts* (1933) 42 YALE L. J. 1051; Payne, *The Gold Clause in Corporate Mortgages* (1934) 20 A. B. A. J. 370; Collier, *Gold Contracts and Legislative Power* (1934) 2 GEO. WASH. L. REV. 303; Note (1933) 1 GEO. WASH. L. REV. 493.

10. It is generally said that nearly all corporate and public bonds in addition to numerous personal obligations contain the gold clause. See BUSINESS WEEK, June 7, 1933, at 7; Payne, *The Gold Clause in Corporate Mortgages* (1934) 20 A. B. A. J. 370. The District Court in the first cited principal case remarked that the gold clause obligations had been estimated as amounting to ninety billion dollars at the minimum.

11. Index of commodity prices from 1926 to the date of the Resolution's passage includes the following figures: (Base Year 1913 = 100) Nov., 1926, 149.5; June, 1927, 141; June, 1928, 151; June, 1929, 148; June, 1930, 129; May, 1931, 103; May, 1932, 88; May, 1933, 90.5. Significant is the fact that the index for May, 1933, on a gold basis was 77. 41 ANNALIST 763 (1933); 136 COMMERCIAL AND FINANCIAL CHRONICLE 3801 (1933).

1. ILL. REV. STAT. (Cahill, 1933) c. 73, § 159.

provided that all foreign insurance companies should be taxed on the basis of their net local receipts, *without* specifically mentioning that the tax applied to the casualty insurance receipts of these companies. *Held* (Cardozo, Brandeis, and Stone, JJ., dissenting), that the statute as construed by the state court in allowing state recovery [2] discriminated against and deprived appellant of the equal protection of the laws under the Constitution, because foreign casualty companies paid no tax whatsoever on their net receipts.[3] *Concordia Fire Insurance Co. v. People,* 54 Sup. Ct. 830 (1934).

The equal protection clause of the Constitution abrogates the state taxing power when the state classifies the subjects of taxation "unreasonably" or "arbitrarily". [4] Within proper classifications the tax must bear equally.[5] The propriety of reasonable classification is maintained though the state discriminates, for the purpose of taxation, between domestic and foreign corporations,[6] between domestic and foreign insurance companies,[7] or between foreign corporations themselves.[8] Nor is the power of classification limited by the mere fact that the subjects of taxation compete.[9] In the principal case, the effect of the dissent and of the state court decision would be to establish a distinction between the casualty insurance business done by foreign fire insurance companies, and that done by foreign casualty insurance companies. In the light of the "Chain Store Cases",[10] where it was held that a higher tax per store on chain stores than on individual stores was not discriminatory, and the "Laundry Case",[11] where the Court held that a tax on hand laundries as distinguished from steam laundries and laundries operated by women was not discriminatory, this would seem to be a "reasonable" classification.[12] But in these last-mentioned cases, the observation is inescapable that by sustaining the distinctions made by the states, the Supreme Court gave hesitant approval to the social or economic result desired by the various legislatures.[13] No such extra-legal justification for the classification appears here—no practical purpose is served by penalizing fire companies for the casualty insurance business they do, especially since

2. People v. Concordia Fire Insurance Co., 350 Ill. 365, 183 N. E. 241 (1932) [where the court apparently relied on an unsupported *dictum* of Taft, C. J., in Hanover Fire Ins. Co. v. Harding, 272 U. S. 494, 506 (1926)].

3. Fidelity & Casualty Co. v. Board of Review of Cook County, 264 Ill. 11, 105 N. E. 704 (1914) (net receipts of foreign casualty companies not subject to taxation by this statute or any other statute).

4. Royster Guano Co. v. Virginia, 253 U. S. 412 (1912); Power Mfg. Co. v. Saunders, 274 U. S. 490 (1927); Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32 (1928); BLACK, CONSTITUTIONAL LAW (1927) § 228.

5. BLACK, *op. cit. supra* note 4, at §§ 228, 229. But see COOLEY, CONSTITUTIONAL LIMITATIONS (7th ed., 1903) 738.

6. Fire Ass'n of Phila. v. New York, 119 U. S. 110 (1886); Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181 (1888); Baltic Mining Co. v. Massachusetts, 231 U. S. 68 (1913).

7. Liverpool & L. Life & Fire Ins. Co. v. Massachusetts, 10 Wall. 566 (U. S. 1870); Ducat v. Chicago, 10 Wall. 410 (U. S. 1870).

8. Cheney Bros. Co. v. Massachusetts, 246 U. S. 147 (1918); Northwestern Mutual Life Insurance Co. v. State of Wisconsin, 247 U. S. 132 (1918).

9. State Board of Tax Commissioners of Indiana v. Jackson, 283 U. S. 527 (1931); Quong Wing v. Kirkendall, 223 U. S. 59 (1912).

10. Board v. Jackson, 283 U. S. 527 (1931); Liggett v. Lee, 288 U. S. 517 (1933), (1933) 81 U. OF PA. L. REV. 871.

11. Quong Wing v. Kirkendall, 223 U. S. 59 (1912).

12. For cases invoking the doctrine of "reasonableness" in discrimination, *cf.* Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389 (1928), (1928) 77 U. OF PA. L. REV. 120; Puget Sound Power & Light Co. v. City of Seattle, 291 U. S. 619 (1934), (1934) 82 U. OF PA. L. REV. 865; and cases cited in Note (1931) 73 A. L. R. 1464.

13. See Howard, *The Supreme Court and State Action Challenged Under the Fourteenth Amendment, 1931-1932* (1933) 81 U. OF PA. L. REV. 505.

these receipts are easily distinguishable and represent a considerable portion of the fire companies' revenue.[14] The majority holding in the principal case indicates that the Court will rely less on *stare decisis* than on a pragmatic evaluation of "reasonableness" in taxation-discrimination cases.[15]

CORPORATIONS—DIVIDENDS—RIGHT OF PREFERRED SHAREHOLDERS TO PARTICIPATE IN SURPLUS BEYOND STATED PREFERENCE—Articles of incorporation, by-laws and stock certificates gave preferred stock preferences in dividends and in assets, without limitation in either respect, except that the stock certificates allowed the preferred dividend "and no more".[1] Preferred dividends were paid regularly, including 1929, when larger cash dividends were received by the common stock, and a dividend of common stock was distributed equally among outstanding common and preferred shares. Then cash dividends were distributed on all common stock. *Held,* that the entire stock dividend was invalid, since it resulted in giving preferred shareholders a dividend participation beyond their stated preference.[2] *Tennant v. Epstein,* 189 N. E. 864 (Ill. 1934).

On the problem of allowing further distribution of surplus to preferred shareholders either by way of participation in dividends or of taking shares issued below market value,[3] the courts are not in full accord. Although granting that the statutes and corporate instruments [4] determine whether preferred shares may participate, most texts state,[5] and the Pennsylvania rule is,[6] that preferred shares are participating unless expressly limited. Most courts, however, realizing the variety among preferred shares,[7] have searched the corporate instruments for denial or grant of the right. If the instruments neither prohibit [8] nor provide for [9] participation, these courts have examined the parties' words and actions as

14. Principal case at 838, in which the analogy to a department store is not well taken—it being certainly less difficult to determine "constituent" casualty receipts than to segregate receipts from individual articles sold in a department store; and 13% is something more than a "small segment" of fire companies' receipts.

15. This decision leaves open the problem whether the statute might not have been constitutional had the receipts of foreign casualty insurance companies been taxed on some equivalent though not identical basis. See (1928) 8 B. U. L. REV. 290.

1. The articles of incorporation provided the preferred stock "shall be a first lien on the assets of the company, in event of its dissolution, over the common stock of the company, and shall be entitled to payment of 7% cumulative dividend annually before any dividend shall be declared and paid upon the common stock."

2. The court declared it invalid as to the common shares also, apparently in order to avoid distorting voting strength.

3. The problem of the right of preferred shareholders to any surplus above the stated preference is common to both these situations. See Russell v. Am. Gas and Electric Co., 152 App. Div. 136, 138, 136 N. Y. Supp. 602, 604 (1912). In some situations, however, there is a distinction between cash and share dividends which is discussed farther on in the text.

4. "Corporate instruments" is here used to designate the articles, by-laws and stock certificates.

5. 1 COOK, CORPORATIONS (8th ed., 1923) § 269; 2 PURDY'S BEACH, PRIVATE CORPORATIONS (1905) § 471; Note (1930) 67 A. L. R. 765, 774.

6. Englander v. Osborne, 261 Pa. 366, 104 Atl. 614 (1918), Note (1920) 6 A. L. R. 800.

7. See Scott v. Baltimore & Ohio R. R., 93 Md. 475, 497, 49 Atl. 327 (1901); (1931) 80 U. OF PA. L. REV. 466, at 467.

8. Scott v. Baltimore & Ohio R. R., 93 Md. 475, 49 Atl.. 327 (1901) (preferred dividend "not exceeding" 4%); Equitable Life Assur. Soc. v. Union Pac. R. R., 212 N. Y. 360, 106 N. E. 92 (1914) ("no other or further share of the profits"); Lyman v. Southern Ry., 149 Va. 274, 141 S. E. 240 (1928) (after paying preferred dividends directors might pay dividends "upon any *other* stock").

9. Bailey v. Hannibal & St. J. R. R., 17 Wall. 96 (U. S. 1873); Gordon's Ex'rs v. Richmond, F. & P. R. R., 78 Va. 501 (1884).

interpreting the "contract", [10] or have denied participation either by implying a limitation to the stated preference [11] or by following the prevalent understanding of the investing public.[12] To protect the preferred shareholders' proportional interests in assets, some courts have allowed participation in stock dividends to preferred shares not limited as to asset distribution; [13] but this reason does not apply to a cash dividend, nor to a situation in which the preferred shares are limited as to capital, for here participation in a dividend of common stock *increases* the preferred shareholders' proportional interests in the assets. One case has allowed preferred shares with voting rights to participate in a stock dividend to maintain proportional voting strength.[14] It is submitted that the courts' goal should be the preservation of those interests which investors in given cases were led reasonably to believe they acquired,[15] *e. g.*, a right to participate and a certain proportional voting strength and interest in assets.[16] In the instant case the court declared invalid the whole stock dividend, because it enabled the preferred shareholders to share in the subsequent *cash* dividend (declared on common stock), as to which the court held the preferred shares were limited—a conclusion drawn unwarrantedly from the existence of a preference, but justifiably from the circumstances and the parties' words and actions.[17]

COURTS—FEDERAL JURISDICTION—POWER OF A FEDERAL COURT TO ENJOIN PROCEEDINGS IN A STATE COURT WHICH DOES NOT RECOGNIZE BANKRUPTCY AS A DISCHARGE OF CERTAIN CLAIMS—Debtor executed an assignment of future wages. Subsequently he was adjudicated a bankrupt and duly discharged. Assignee sued the employer for wages earned subsequent to bankruptcy, whereupon assignor petitioned federal court to enjoin assignee from further proceeding in the state court. *Held,* that the injunction would lie. *Local Loan Co. v. Hunt,* 54 Sup. Ct. 695 (1934).

10. Shimmon v. National Screw & Tack Co., 18 Ohio N. P. N. S. 569 (1916). The words "and no more" in the stock certificates, and past acceptance of only the preferred dividend although the common shares received a larger percentage, were said in the instant case, at p. 869, to show the parties' interpretation of their rights. See Niles v. Ludlow Valve Mfg. Co., 202 Fed. 141, 142 (C. C. A. 2d, 1913). But see dissent in Niles Case, *supra,* at 144.

11. Niles v. Ludlow Valve Mfg. Co., 202 Fed. 141 (C. C. A. 2d, 1913); Will v. United Lankat Plantations Co., [1912] 2 Ch. 571, *aff'd,* [1914] A. C. 11. But see Lyman v. Southern Ry., 149 Va. 274, 291, 141 S. E. 240, 245 (1928) (failure to provide must be interpreted differently in different cases); Scott v. Baltimore & Ohio R. R., 93 Md. 475, 501, 49 Atl. 327, 329 (1901).

12. See Stone v. United States Envelope Co., 119 Me. 394, 398, 111 Atl. 536, 538 (1920); Thomas F. Powers Foundry Co. v. Miller, 171 Atl. 842, 848 (Md. 1934).

13. Jones v. Concord & M. R. R., 67 N. H. 234, 30 Atl. 614 (1892); Thomas Branch & Co. v. Riverside and D. River Cotton Mills, Inc., 139 Va. 291, 123 S. E. 542 (1924). As to when a preference in assets exists, see Note (1931) 79 U. OF PA. L. REV. 466, at 470 *et seq.* A limited dividend preference may give a limited priority at dissolution in earned surplus, even though there is no right to priority in assets. (1933) 81 U. OF PA. L. REV. 875.

14. Riverside and D. River Cotton Mills v. Thomas Branch & Co., 147 Va. 509, 137 S. E. 620 (1927).

15. For different suggestions see Note (1931) 79 U. OF PA. L. REV. 466, at 473; Christ, *Right of Holders of Preferred Stock to Participate in the Distribution of Profits* (1929) 27 MICH. L. REV. 731, at 745, where the problem arising when voting strength and assets interests clash is discussed.

16. The last two interests involve pre-emptive rights [see RESTATEMENT, BUSINESS ASSOCIATIONS (Tent. Draft, 1928) § 12, illustration 4, and § 19], and may be prohibited by statute unless set forth in the articles. See PA. STAT. ANN. (Purdon Supp., 1933) tit. 15, § 2852-611; ILL. REV. STAT. (Cahill, 1931) c. 32, § 6, par. 4.

17. All the shares of the corporation had always been held by the parties in this case, and the court set forth at length the facts surrounding the creation of the share structure, in addition to those facts mentioned in note 10, *supra.*

With few legislative exceptions [1] the federal courts are denied by statute [2] the power to enjoin proceedings in state courts.[3] The law is well settled, however, that a federal court may restrain proceedings in a state court which would have the effect of defeating or impairing its decrees or judgments.[4] If proceedings in a state court which had previously decided [5] that an assignment of future wages survives bankruptcy tend to defeat the federal court's decrees of adjudication of and discharge in bankruptcy then the decision in the principal case follows inevitably. The whole issue turns upon the question of which court has jurisdiction in determining the effect of bankruptcy on claims presented against the debtor. It has been argued that the right to a discharge and the effect of a discharge are wholly distinct propositions and that the proper time and place for the determination of the effect of a discharge is when it is pleaded or relied upon by the debtor as a defense.[6] The decisions expressing this view qualify it by stating that if the state court fails to accord the proper effect to the discharge the debtor may appeal by writ of *certiorari* to the Supreme Court of the United States.[7] The highest federal court is therefore the court of last resort in determining the effect of discharge in bankruptcy. A federal court [8] has already granted an injunction where there was no conflict between the state court's interpretation and that of the federal judiciary on the ground that the debtor is entitled to relief from an harassing action by the creditor after bankruptcy.[9] *A fortiori,* an injunction would lie where the state court refused to recognize bankruptcy as a discharge of such a claim.[10] On logical consider-

1. The legislative exceptions to the prohibitory statute consist of: (1) proceedings in bankruptcy (administering assets of the bankrupt's estate), 36 STAT. 1162, 28 U. S. C. A. § 379 (1928); see also 11 U. S. C. A. § 11, n. 194 (1928); (2) The Federal Insurance Interpleader Act, 44 STAT. 416 (1926), 28 U. S. C. A. SUPP. VI § 41, n. 26 (1932); (3) The Act To Limit The Liability of Shipowners, 9 STAT. 636 (1851), 46 U. S. C. A. § 185 (1928).

2. 36 STAT. 1162, 28 U. S. C. A. § 379 (1928).

3. In addition to the legislative exceptions enumerated in note 1 *supra,* the courts have permitted exceptions to the statute in three general classes of cases: (1) Cases enjoining the execution of fraudulent judgments. See cases collected in 1 BATES, FEDERAL EQUITY PROCEDURE (1901) § 543; (2) Cases before administrative tribunals, such as railroad commissions, which have mixed legislative, executive, and judicial functions. Bacon v. Rutland R. R., 232 U. S. 134 (1914); (3) Cases where the federal court must act to protect its own jurisdiction, judgments, or decrees. See cases collected in 1 BATES, FEDERAL EQUITY PROCEDURE (1901) § 541, and see 1 JOYCE, INJUNCTIONS (1909) § 88.

4. Julian v. Central Trust Co., 193 U. S. 93 (1904); Brunn v. Mann, 151 Fed. 145 (C. C. A. 8th, 1906); Loy v. Alston, 172 Fed. 90 (C. C. A. 8th, 1909).

5. Mallin v. Wenham, 209 Ill. 252, 70 N. E. 564 (1904); Monarch Discount Co. v. Chesapeake & O. R. R., 285 Ill. 233, 120 N. E. 743 (1918).

6. *In re* Marshall Paper Co., 102 Fed. 872 (C. C. A. 1st, 1900); *In re* Havens, 272 Fed. 975, 976 (C. C. A. 2d, 1921), where it was stated, ". . . granting a discharge is a function of the bankruptcy court alone, the effect thereof is for any court in which it is duly pleaded or otherwise submitted for judgment."

7. See *In re* Havens, 272 Fed. 975, 976 (C. C. A. 2d, 1921).

8. Seaboard Small Loan Corp. v. Ottinger, 50 Fed. (2d) 856 (C. C. A. 4th, 1931).

9. The Court sustained its equity jurisdiction by stating that the bankrupt did not have an adequate remedy at law by pleading the discharge in a suit brought to collect the debt, or by suing the employer if he wrongfully withheld wages because of the trouble, financial embarrassment, possible loss of employment, and expenses attendant on such action; that an employer reasonably might prefer to discharge an employee rather than engage in litigation with the assignee; and that the bankrupt would prefer to pay the debt rather than risk his employment by suing his employer for withholding his wages. Principal case at 859.

10. The Court was all the more inclined to grant the injunction, since to refuse it would result in sending the assignee back to the state courts where he was foredoomed, leaving him as a last resort—after passing through the intermediate and appellate state courts—an appeal to the Supreme Court: a process of litigation which no reasonable man would be expected to pursue in an issue involving a small claim at most. Instant case, at 698.

ations, therefore, the decision of the Court is justified. And since it is conceded that the federal judiciary has the *last* opinion on the question,[11] the Court reached the proper result from the standpoint of practical economy as well, in giving it the *first*—and *only*—opinion.[12] It is a decision attendant with far-reaching effects;[13] a decision which is withal in accord with the spirit and purpose[14] of the Bankruptcy Act.

CRIMINAL LAW—TRIAL—RIGHT OF DEFENDANT TO HAVE CHARGE DELIVERED BY JUDGE WHO PRESIDED AT THE TRIAL—Defendant was found guilty of fraudulent conversion and similar offenses. The trial judge having become seriously ill, the jury was charged, over defendant's objection, by a substituted judge who had heard none of the testimony. *Held* (three judges dissenting), that the substitution of judges rendered the entire proceeding nugatory. *Commonwealth v. Claney*, 173 Atl. 840 (Pa. Super. Ct. 1934).

The Pennsylvania court, passing upon this question for the first time, adopted the prevailing view.[1] The principle that the same judge must remain throughout a trial has adduced as its justification a number of theories. Among these are interpretative definitions of the "trial by jury" pledged by federal and state constitutions;[2] as well as an asserted analogy[3] to the well-established rule that any substantial absence of the judge which leaves the bench empty during a criminal trial is ground for reversal.[4] More reasonable is the argument that a judge acquainted with the evidence only through the transcript of testimony, without having observed the demeanor of witnesses or heard the addresses of counsel, is unlikely to gain a thorough insight into the case.[5] This contention acquires particular significance in such jurisdictions as Pennsylvania, which permit the judge, in his charge, to comment on the testimony and the credibility of witnesses.[6] Other courts, however, less tender toward the rights of a defendant, have encumbered the general rule with a number of qualifications. Some

11. See *In re* Havens, 272 Fed. 975, 976 (C. C. A. 2d, 1921).

12. By obtaining an injunction in the federal court the debtor need not submit to the process of litigation indicated in note 10, *supra*.

13. Presumably one result of the decision in the principal case will be a tendency to unify the law regarding the effect of bankruptcy on an assignment of future wages, since in the few jurisdictions holding the minority view the assignor has but to apply to the federal court for an injunction should the assignee attempt to enforce the claim.

14. To ". . . relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." Williams v. United States Fid. & Guar. Co., 236 U. S. 549, 554 (1915).

1. Freeman v. United States, 227 Fed. 732 (C. C. A. 2d, 1915); Durden v. People, 192 Ill. 493, 61 N. E. 317 (1901); People v. McPherson, 74 Hun 336, 26 N. Y. Supp. 236 (Sup. Ct. 1893); Mason v. State, 26 Ohio C. C. R. 535 (1904).

2. See Freeman v. United States, 227 Fed. 732, 759 (C. C. A. 2d, 1915). "It is the opinion of this court that in a criminal case trial by jury means trial by a tribunal consisting of at least one judge and twelve jurors, all of whom must remain identical from beginning to end."

3. See Durden v. People, 192 Ill. 493, 508, 61 N. E. 317, 320 (1901). *Contra:* York v. State, 91 Ark. 582, 586, 121 S. W. 1070, 1071 (1909).

4. People v. Blackman, 127 Cal. 248, 59 Pac. 573 (1899); Thompson v. People, 144 Ill. 378, 32 N. E. 968 (1893); Note (1898) 41 L. R. A. 569; see Lehman, *A Critical Survey of Certain Phases of Trial Procedure in Criminal Cases* (1915) 63 U. OF PA. L. REV. 609, 628-632.

5. See Freeman v. United States, 227 Fed. 732, 759 (C. C. A. 2d, 1915); 3 WIGMORE, EVIDENCE (2d ed. 1923) § 1395; instant case at 841.

6. Burr v. Sim, 4 Whart. 150 (Pa. 1839); Supplee v. Timothy, 124 Pa. 375, 16 Atl. 864 (1889).

have refused to apply the rule to a mere civil trial or misdemeanor;[7] others have invoked the defendant's *consent* to the substitution of judges,[8] citing the familiar maxim that the defendant will not be allowed to speculate on a favorable verdict;[9] many have been readier to permit substitution after the jury has returned its verdict, and there remains for the judge only to pass sentence,[10] to pass on a motion for a new trial,[11] or to sign a bill of exceptions.[12] These liberalizations of a specific procedural rule indicate a broader tendency on the part of appellate courts, where they consider substantial justice to have been done, not to disturb a verdict on rigid notions of procedural mistake.[13] In a few instances, a desire to reduce the number of reversals on such grounds has manifested itself in a refusal to presume prejudice to the defendant where none has been shown.[14] It remains to be seen, in future variants of the instant case, how far Pennsylvania will go in seeking to reconcile these conflicting desiderata: complete fairness to one criminally accused, and a rapid inexpensive administration of justice.[15]

DAMAGES—MEASURE OF DAMAGES FOR DEATH OF A MINOR CHILD—EFFECT OF A PENAL STATUTE REQUIRING CHILD TO SUPPORT INDIGENT PARENTS —Plaintiff's son (aged twenty years, nine months) was killed by defendant's negligence. A statute required adult children, if able, to support their indigent parents where both were residents of the state, under penalty of fine and imprisonment.[1] The plaintiff sought to recover compensation not only for value

7. See Turberville v. State, 56 Miss. 793, 799 (1879); Ellerbe v. State, 75 Miss. 522, 529, 22 So. 950, 951 (1898).

8. People v. Henderson, 28 Cal. 465 (1865); State v. McCray, 189 Iowa 1239, 179 N. W. 627 (1920) [substitution no error where defendant (1) asks no continuance; (2) nor recall of witnesses already examined; and (3) fully consents through counsel to continuance of the case]; State v. Wood, 118 Kan. 58, 233 Pac. 1029 (1925); *cf.* York v. State, 91 Ark. 582, 121 S. W. 1070 (1909) which the court in the instant case at 841 attempted to distinguish on the ground of consent. *Contra:* Freeman v. United States, 227 Fed. 732 (C. C. A. 2d, 1915); Ellerbe v. State, 75 Miss. 522, 22 So. 950 (1898); and see instant case at 841 *semble.*

9. Hanye v. State, 211 Ala. 555, 101 So. 108 (1924); Garrett v. State, 21 Ga. App. 801, 95 S. E. 301 (1918).

10. Pegalow v. State, 20 Wis. 61 (1865). But see *id.* at 62. Here (murder in the first degree) the penalty was fixed by statute.

11. Meldrum v. United States, 151 Fed. 177 (C. C. A. 9th, 1907); State v. Madry, 93 S. C. 412, 76 S. E. 977 (1912); Notes (1907) 7 ANN. CAS. 493; ANN. CAS. 1914B, 1235. The rule has been incorporated in 31 STAT. 270 (1900), 28 U. S. C. A. § 776 (1928).

12. Bowden v. Wilson, 21 Fla. 165 (1865); Ketcham v. Hill, 42 Ind. 64 (1873); Conway v. Smith Mercantile Co., 6 Wyo. 327, 44 Pac. 940; 31 STAT. 270 (1900), 28 U. S. C. A. § 776 (1928).

13. People v. O'Bryan, 165 Cal. 55, 130 Pac. 1042 (1913); People v. Fleming, 166 Cal. 357, 136 Pac. 291 (1913); and see Durden v. People, 192 Ill. 493, 498, 61 N. E. 317, 319 (1901); Baker, *Reversible Error in Homicide Cases* (1932) 23 J. CRIM. L. 28, 35-38. This tendency has received legislative sanction in 40 STAT. 1181 (1919) 28 U. S. C. A. § 391 (1928); CAL. CONST. (1911) art. VI, §4½.

14. Rich v. United States, 271 Fed. 566 (C. C. A. 8th, 1921); Armstrong v. United States, 16 F. (2d) 62 (C. C. A. 9th, 1926); and see Vernier and Selig, *The Reversal of Criminal Cases in the Supreme Court of California* (1928) 2 So. CALIF. L. REV. 21, 47.

15. In California over a fifty year period (1850 to 1900) more than 83% of all reversals in criminal cases were due to "procedural errors". Vernier and Selig, *supra* note 13 at 26. The trial of the instant case consumed four weeks and 1,900 pages of testimony.

1. MD. ANN. CODE (Bagby, 1924) art. 27, §§ 91-93.

of deceased's services during the balance of minority, but also, on the basis of the statute, for loss of possible benefits conferred by it. *Held* (three justices dissenting), that compensation was limited to period of minority. *State, Use of Strepay v. Cohen,* 172 Atl. 274 (Md. 1934).

Actions to recover compensation for the death of another being unknown at common law,[2] the measure of damages differs widely in accordance with the wording of the statutes.[3] In an action for the death of a minor child, the weight of authority allows recovery not only for the value of the child's services during his minority, but also for reasonable future benefits that might accrue to the parent after the child reaches his majority.[4] As to what constitute reasonable future benefits the courts differ.[5] Because of judicial reluctance to allow juries to speculate without evidential restrictions on the question of the child's actions after he would have reached his majority,[6] some courts limit recovery to the pecuniary value of the child's services during minority.[7] The principal case is an example of an attempt to extend the measure of damages in one of the minority jurisdictions. The court held that the support statute created no civil rights in the plaintiff of which he could avail himself in an action against a third party. A similar interpretation of such statutes has found support in other states.[8] A second objection to the utilization of these statutes in this manner is the constitutional one that their application would create a different measure of damages between residents and non-residents. The court seemed to realize the tenuous nature of this objection and did not stress it.[9] The principal reason for the court's unwillingness to extend the measure of damages is that the use of the statute does not obviate the necessity for requiring the jury to guess blindly whether the circumstances which would make the statute applicable would come into being, and if so, what measure of damages to apply.[10] In view of this decision it seems unlikely that those minority jurisdictions which

2. Baker v. Bolton, 1 Campb. 493 (1808), decided at *nisi prius,* but quoted as authority for Lord Ellenborough's proposition, "In a civil court the death of a human being cannot be complained of as an injury." Insurance Co. v. Brame, 95 U. S. 754 (1877).

3. For an analytical table of these statutes see TIFFANY, DEATH BY WRONGFUL ACT (2d ed. 1913) pp. xix to lxxi.

4. 2 SEDGWICK, DAMAGES (9th ed. 1912) § 575; Bond v. United Railroads of San Francisco, 159 Cal. 270, 113 Pac. 366 (1911); Hayes v. Chicago R. R., 131 Wis. 399, 111 N. W. 471 (1907); Stratton v. Sioux Falls Traction System, 49 S. D. 113, 206 N. W. 466 (1925). See Note (1914) 48 L. R. A. (N. S.) 687 for a collection of cases illustrating both majority and minority views.

5. In Fisher v. Trester, 119 Neb. 529, 229 N. W. 901 (1930), the court held that the measure of damages was not "probable pecuniary loss" but rather pecuniary loss "which the evidence shows with reasonable certainty". But in Luther v. Dornack, 179 Minn. 528, 530, 229 N. W. 784, 785 (1930), the court stated that "resort must necessarily be had to probabilities and even to possibilities which are reasonable". There was a similar holding in Birkett v. Knickerbocker Ice Co., 110 N. Y. 504, 18 N. E. 108 (1888).

6. Agricultural & Mechanical Association v. State, Use of Carty, 71 Md. 86, 104, 18 Atl. 37, 38 (1889). ("But what a minor child may be able or willing to do for his father . . . after he becomes of age, . . . is . . . a matter of conjecture too vague to enter into an estimate of damages . . .")

7. 2 SEDGWICK, DAMAGES (2d ed. 1912) § 575; Cappozzi v. City of Waterbury, 115 Conn. 107, 160 Atl. 435 (1932); Scherer v. Schlaberg, 18 N. D. 421, 122 N. W. 1000 (1909); Powell v. Rosseau, 38 R. I. 294, 94 Atl. 867 (1915).

8. See Haskamp v. Swenger, 85 Ind. App. 255, 258, 153 N. E. 815, 816 (1926) (penal statute); Spomer v. Allied Electric Co., 120 Neb. 399, 232 N. W. 767 (1930) (remedial statute).

9. See Chief Justice Bond's dissenting opinion in principal case at 280. It would seem that if the support statute itself which is limited in application to Maryland residents is not unconstitutional, an indirect utilization of it would not be.

10. Principal case at 277.

have either penal [11] or remedial [12] support statutes will go contrary to established precedent to complicate further an already complicated problem.[13]

DESCENT AND DISTRIBUTION—PERSONS ENTITLED AND THEIR RESPECTIVE SHARES—RIGHT OF MURDERER'S ADMINISTRATOR TO SHARE IN THE ESTATE OF THE VICTIM—A father killed his wife and daughter and then committed suicide. The statute of descents barred persons "finally adjudged guilty" of murder from sharing in the estates of the victims.[1] The grandfather, next of kin after the father, appealed from a decree of the orphans' court awarding the daughter's property to the father's administrator. *Held,* that the decree be affirmed, since the statutory distribution may be disturbed only by a conviction in a competent criminal court. In re *Tarlo's Estate,* 315 Pa. 321, 172 Atl. 139 (1934).

Since all the judges but one [2] in the instant case agreed that the statutory bar was inapplicable,[3] the situation becomes analogous to the much-mooted one involving a clear and unambiguous statute of descents containing no exceptions. In *Carpenter's Estate,*[4] which presented this exact problem, the Pennsylvania court had previously refused to interfere with the statutory order, and the majority of courts are in accord.[5] In view of the impossibility of convicting a suicide in a competent tribunal, more comprehensive statutory prohibitions are necessary if this phase of the problem is to be solved by legislation. Already, however, the familiar common law maxim that one shall not profit by his own wrong has inspired frequent attempts to reach the desired result judicially. Some courts have held flatly that title to the estate does not pass,[6] despite the majority

11. As Indiana. IND. ANN. STAT. (Baldwin, 1934) § 2893.

12. As Pennsylvania. PA. STAT. ANN. (Purdon, 1930) tit. 62, §§ 1012-1014.

13. Spomer v. Allied Electric Co., 120 Neb. 399, 232 N. W. 767 (1930), cited note 10, *supra.* But see Morhart v. North Jersey Street Ry., 64 N. J. L. 236, 238, 45 Atl. 812, 813 (1900).

1. PA. STAT. ANN. (Purdon, 1930) tit. 20, § 136.

2. Frazer, C. J., was of the opinion that the orphans' court was competent to adjudge the father guilty of murder for the purposes of distributing the estate. But since the statutory exception was admittedly made to remedy the situation in Carpenter's Estate, 170 Pa. 203, 32 Atl. 637 (1895), where a conviction of murder had taken place, it is difficult to disagree with the majority of the court in their contention that "finally adjudged guilty" has reference to a criminal conviction.

3. A similar situation was presented in Hogg v. Witham, 120 Kan. 341, 242 Pac. 1021 (1926), where a coroner's jury returned a finding that the claimant's intestate had murdered his wife before committing suicide. This was held insufficient to bring the case under a statute barring those "convicted of killing" from the estates of their victims.

4. 170 Pa. 203, 32 Atl. 637 (1895). The statute under which this case was decided contained no exceptions. See *supra* note 2.

5. Wall v. Pfanschmidt, 265 Ill. 180, 106 N. E. 785 (1914); McAllister v. Fair, 72 Kan. 533, 84 Pac. 112 (1906); Holloway v. McCormick, 41 Okla. 1, 136 Pac. 1111 (1913). Insurance cases in which beneficiaries are denied recovery after murdering those insured, although sometimes cited in opposition to the majority view, are clearly not analogous, based as they are upon contract, not statute. For a discussion of a recent case of this type, see (1932) 81 U. OF PA. L. REV. 227.

6. Price v. Hitaffer, 164 Md. 505, 165 Atl. 470 (1933); Garwols v. Bankers Trust Co., 251 Mich. 420, 232 N. W. 239 (1930), Note (1931) 8 N. Y. U. L. Q. REV. 492; Perry v. Strawbridge, 209 Mo. 621, 108 S. W. 641 (1908). An analogous situation was presented in Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188 (1889), an early leading case. The beneficiary under a will murdered the testator. The court refused to heed the argument that the will could be altered or revoked only as provided by the statute, and denied the murderer any property on the grounds that the legislators could not have intended a result so contrary to public policy and equity. The case is discussed in CARDOZO, NATURE OF THE JUDICIAL PROCESS (1921) 40.

view that there is no warrant for reading exceptions into a clearly worded statute. An ingenious means of circumventing the obstacles to this direct method is provided by the constructive trust theory, whereby the title passes as provided by the statute, but equity intervenes to compel the wrongdoer, or his representatives, to hold the property in trust for those next in line. The theory has ample critical support,[7] and has been utilized by the courts in similar situations;[8] two dissenting judges advocated its application in the instant case.[9] A difficulty is presented by the fact that the grandfather, who probably would not have lived to share in the estate in the normal course of events, is not in a position of being unjustly deprived. Since, however, the administrator's rights are derived from those of the killer, it is submitted that he has an even less persuasive claim; if there must be a windfall, a homicide should not be allowed to dictate its recipient.[10]

TRUSTS—LIFE BENEFICIARY AND REMAINDERMAN—STATUS OF PRE-EMPTIVE RIGHTS GRANTED DURING LIFE INTEREST—Plaintiffs were remaindermen under a trust agreement, the corpus consisting of corporate shares. They sought to recover, from the life beneficiary's estate, the proceeds of the sale of pre-emptive rights granted during the life interest, contending that this sum accrued to the trust principal and was not "income" to which decedent was entitled by the agreement. *Held,* that proceeds accrued to principal only to the extent necessary to preserve the intact value[1] of the corpus, the balance belonging to income. In re *Schnur's Estate,* 32 P. (2d) 970 (Cal. 1934).

The disagreement as to whether pre-emptive rights granted during a life interest[2] accrue to income or principal, in the absence of a clear expression of intention,[3] largely reflects the division of authority concerning the status of stock dividends, to which these rights seem analogous.[4] They accomplish, in effect,

7. Note (1917) 30 HARV. L. REV. 622; Note (1916) 64 U. OF PA. L. REV. 307; Ames, *Can a Murderer Acquire Title by His Crime and Keep It?* (1897) 36 AM. L. REG. (N. S.) 225, reprinted in AMES, LECTURES ON LEGAL HISTORY (1910) 310; 3 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 1054 n. b.

8. Barnett v. Couey, 224 Mo. App. 913, 27 S. W. (2d) 757 (1930), (1930) 44 HARV. L. REV. 125; Bryant v. Bryant, 193 N. C. 372, 137 S. E. 188 (1927); Sherman v. Weber, 167 Atl. 517 (N. J. Eq. 1933), (1933) 82 U. OF PA. L. REV. 183.

9. Principal case at 143.

10. Considerable critical attention has been given to the advisability of limiting the amount of the constructive trust on the basis of mortality tables and similar data. (1933) 82 U. OF PA. L. REV. 183; Ames, *supra* note 7, at 237 *et seq.;* Note (1931) 8 N. Y. U. L. Q. REV. 492, 496; Note (1917) 30 HARV. L. REV. 622, 625. While this refinement seems logical in that it makes a just award to the *cestui,* it does not satisfy the objection that limitation of the trust gives the remainder to the murderer or to those claiming through him.

1. California courts define intact value as the value of the shares as it existed at the date of the creation of the trust. *In re* Gartenlaub's Estate, 185 Cal. 375, 197 Pac. 90 (1921).

2. Under the so-called "Kentucky rule," such rights and dividends belong to that person having a present interest in them at the time of issuance or declaration, irrespective of when the earnings they represent were accumulated. Hite's Devisees v. Hite's Executor, 93 Ky. 257, 20 S. W. 778 (1892); Lightfoot v. Beard, 230 Ky. 488, 20 S. W. (2d) 90 (1929). Kentucky is the only jurisdiction definitely adhering to this view which frequently effects flagrant injustice.

3. An intention clearly expressed in the trust agreement governs. Gibbons v. Mahon, 136 U. S. 549 (1890).

4. Kentucky courts hold that pre-emptive rights "stand on a different footing from the claim to a stock dividend." Hite's Devisees v. Hite's Executor, 93 Ky. 257, 20 S. W. 778 (1892). The argument advanced that such rights are "an incident of the original shares" would seem equally applicable to stock dividends themselves. The conclusion that rights are not dividends in any sense is also upheld in 2 PERRY, TRUSTS (7th ed. 1929) § 546.

distribution of surplus by way of a stock dividend, the shares being partly, instead of fully, paid from surplus.[5] That a payment is necessary to secure the stock does not affect the nature of the right, which exists primarily because of the doctrine that shareholders are entitled to a continuance of their proportionate interests in the corporate enterprise.[6] Largely in order to allow each present investor an opportunity to maintain his relative voting strength, one of the most important interests under this doctrine, the "Massachusetts rule" arbitrarily considers cash dividends as income and stock dividends as principal—a view emphasizing simplicity of accounting, and furnishing the trustee an accurate measure of his duties, though minimizing the life beneficiary's equitable claims. Courts following this practical view logically extend it, consistently classifying preemptive rights as principal.[7] California, however, did not see fit to follow this course, having previously adopted the more equitable Pennsylvania rule of apportionment, whereby stock dividends earned wholly or partly during the life interest accrue to income, providing the intact value of the principal is preserved.[8] The instant case, of first impression in California, applied this doctrine to stock subscription rights, recognizing an analogy that the overwhelming majority of those jurisdictions favoring the Pennsylvania stock dividend view have apparently failed to see.[9] The practical difficulties of apportionment, the outstanding objection to the rule, are no more insuperable in one case than in the other. Detailed investigation of the corporate books, in order to determine that proportion of the distributed earnings accumulated during the life interest, involves no complex or unusual accounting technique, regardless of the form of distribution. Apportionment logically should be adopted in both instances or discarded entirely.

WORKMEN'S COMPENSATION—RELIEF WORKERS—WORKMEN'S COMPENSATION ACTS AS APPLIED TO WORKMEN ENGAGED IN GOVERNMENTAL UNEMPLOYMENT RELIEF PROJECTS—Mandamus proceedings were instituted to determine whether governmental subdivisions engaged in Federal Emergency Relief

5. For a brief discussion of the form and nature of stock subscription rights, see Garner and Forsythe, *Stock Purchase Warrants and "Rights"*, (1931) 4 So. CALIF. L. REV. 269. The division of authority concerning the status of stock dividends is well set forth in 2 PERRY, TRUSTS (7th ed. 1929) § 544 *et seq.*; (1921) 69 U. OF PA. L. REV. 288.

6. Earlier texts were prone to overemphasize the importance of this doctrine as the reason for the existence of the right. See 1 MORAWETZ, PRIVATE CORPORATIONS (2d ed. 1886) § 455. That corporations continue to grant pre-emptive rights despite the legislative tendency to make issuance non-obligatory (BALLANTINE, CALIF. CORP. LAWS (1932 ed.) 98; CAL. CIVIL CODE (Deering, 1931) § 297), indicates that perhaps the practical advantages this form of distribution offers to the companies themselves largely explain its existence.

7. DeKoven v. Alsop, 205 Ill. 309, 68 N. E. 930 (1903); Chase v. Union National Bank, 278 Mass. 503, 176 N. E. 508 (1931); Greene v. Smith, 17 R. I. 28, 19 Atl. 1081 (1890).

8. *In re* Duffill's Estate, 180 Cal. 748, 183 Pac. 337 (1919); *In re* Gartenlaub's Estate, 185 Cal. 375, 197 Pac. 90 (1921). The Pennsylvania rule has been adopted by the slight majority of jurisdictions where the question of the status of stock dividends has squarely arisen. Goodwin v. McGaughy, 108 Minn. 248, 122 N. W. 6 (1909); Pritchett v. Nashville Trust Co., 96 Tenn. 472, 36 S. W. 1064 (1896).

9. Lauman v. Foster, 157 Iowa 275, 135 N. W. 14 (1912); *In re* Merrill's Estate, 196 Wis. 351, 220 N. W. 215 (1928). Only three jurisdictions upholding apportionment of stock dividends apply the doctrine to stock subscription rights: (1) Pennsylvania, Jones v. Integrity Trust Co., 292 Pa. 149, 140 Atl. 862 (1928); (2) New Hampshire, Holbrook v. Holbrook, 74 N. H. 201, 66 Atl. 124 (1907); and (3) California, in the instant case. The RESTATEMENT, TRUSTS (Tent. Draft, 1933) § 228, indulges in the illogical view of the majority, although the appendix indicates that the final draft may incorporate alternative § 228 which follows the Massachusetts view.

projects[1] were under any duty to contribute to the State Insurance Fund to provide for workers injured while thus engaged. *Held,* that the governmental subdivisions engaged in such projects need not accept the Industrial Insurance Act[2] and contribute to the Fund, because such projects are not "state industries", and workmen thereon are not "employees" of the state and its political subdivisions, which are not "employers" within the meaning of the act. *State* ex rel. *State Board of Charities and Public Welfare v. Nevada Industrial Commission,* 34 P. (2d) 408 (Nev. 1934).

Because workmen's compensation law is entirely statutory, it is necessary in any given case to determine whether the particular relief activity under review falls within the scope of the state compensation act,[3] and whether by the terms of the particular act a public body can be considered an employer. It is everywhere recognized, however, that the right to workmen's compensation rests on the contractual relation of employer and employee.[4] In determining the existence of this relation, the courts have apparently, though without any conscious reference thereto, adopted the nature and purpose of the payment made to the worker and the method by which he is hired as the tests to be applied. As a result three categories are discernible in the reported decisions, in the latter two of which alone are the workmen's compensation statutes held applicable: (1) where the extent of the relief, usually in the form of "food" or "supply" orders, but occasionally money, is determined by investigation, and is not conditioned upon his performing the "made work" provided for him;[5] (2) where the relief fund is administered by employing the applicant for relief on public property at regular and specified wages for regular and specified hours;[6] (3) where the relief agency, acting as an employment bureau, provides work for the applicant with some other public body, which latter employs him or not as it sees fit, and as he fulfills its requirements.[7] The principal case falls within the first category and is consistent with decisions in other courts of the United States regarding similar situations.[8] The English courts in finding the necessary contractual

1. Federal Emergency Relief Act of 1933, 48 STAT. 55, 15 U. S. C. A. § 721 (Supp. 1933).

2. NEV. COMP. LAWS (1929) § 2680 *et seq.*

3. The Workmen's Compensation Acts in some jurisdictions are applied only to activities of an extra-hazardous nature; or to those specifically enumerated in the act; or to those carried on for gain.

4. McBurney v. Industrial Accident Commission of California, 30 P. (2d) 414 (Cal. 1934); Porton v. Central (Unemployed) Body for London, 2 B. W. C. C. (N. S.) 296 (Ct. of App. 1908) (Each of these decisions was based on a Workmen's Compensation Act which required a "contract of hire" or "service" as the basis for compensation). Thirty-five of the forty-four states in the United States which have Compensation Acts, in defining employer and employee use the term "contract of hire". The remaining nine use more general terms, all however expressing the necessity of the existence of a regular employer-employee relationship as a prerequisite to the application of the act. Basham v. Kanawha County Court, 171 S. E. 893 (W. Va. 1934).

5. McBurney v. Industrial Accident Comm. of Cal., 30 P. (2d) 414 (Cal. 1934); Jackson v. North Carolina Emergency Relief Administration, 206 N. C. 274, 173 S. E. 580 (1934).

6. City of Waycross v. Hayes, 48 Ga. App. 317, 172 S. E. 756 (1934). It is within this second category, that the English decisions, apparently contrary to those in this country, fall: Porton v. Central (Unemployed) Body for London, 2 B. W. C. C. (N. S.) 296 (Ct. of App. 1908); Gilroy v Mackie, 2 B. W. C. C. (N. S.) 269 (1909).

7. McLaughlin v. Antrim County Road Comm., 266 Mich. 73, 253 N. W. 221 (1934). It is far simpler to find that the Workmen's Compensation Act applies in this category, than in the one immediately preceding; for herein it is merely a matter of bringing the workman into contact with an already open job, and the aspect of relief is but incidental to the employment, whereas in the preceding one the work is likely to be "made" solely for relief applicants.

8. While there are no facts given in the report of the instant case, we are led to infer that the court is dealing with a situation like that presented in the first category, not only from the language which it employs, ". . . such workmen are not employed by the state . . .

relationship have stressed rather the point of whether the applicant for relief has voluntarily undertaken the employment,[9] whereas the American decisions have given but scant consideration to this factor.[10] The aspect of employment voluntarily undertaken is present, however, in all the categories given, though the compensation statutes are held applicable only to the latter two; it is only by applying these categories that the apparent inconsistencies between the decisions here and abroad can be reconciled.[11]

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but are provided with work because of the need of means of support for themselves and their families. The money paid them is not paid as a contractual remuneration for their work, but is paid for the relief of themselves and their families"; but also from the fact that the relief funds being disbursed were provided by the Federal government, and other cases dealing with funds from that source have presented situations which fall into the first category: Jackson v. North Carolina Emergency Relief Administration, 206 N. C. 274, 173 S. E. 580 (1934); Bell v. City of Raleigh, 206 N. C. 275, 173 S. E. 581 (1934).

9. Porton v. Central (Unemployed) Body for London, 2 B. W. C. C. (N. S.) 296 (Ct. of App. 1908); Gilroy v. Mackie, 2 B. W. C. C. (N. S.) 269 (1909).

10. *Cf.* dissent in Vaivida v. City of Grand Rapids, 264 Mich. 204, 249 N. W. 826 (1933).

11. But *cf.* (1933) 82 U. OF PA. L. REV. 185.